87-481

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

JAMES H. LYONS,
Petitioner,

vs.

HONORABLE JAMES W. JACKSON, JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits a second trial where the first jury is discharged as "genuinely deadlocked" three hours after it has reached an agreement, and the trial judge has made no inquiry of the jurors regarding their previous "agreement" or the possibility of reaching a verdict.

PARTIES

The petitioner here is James Lyons. The respondent is the Honorable James W. Jackson, a duly elected and sitting Common Pleas Court Judge who presided at the trial and would conduct a retrial.

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No.

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For the Sixth Circuit

DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported and is attached in the appendix (A1). The decision of the United States District Court for the Northern District of Ohio is unreported and is attached in the appendix (A9). The report of the magistrate is attached in the appendix (A11).[1]

1. Another written decision in this same case was issued by the Ohio Court of Appeals, Eleventh District during the direct appeal through the state court system. While that decision was probably not from a "court below" as that term is used in Sup. Ct. Rule 21.1(e), it was reprinted in the appendix to petitioner's first petition, Case No. 84-1472, October Term, 1984.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on June 19, 1987. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

James Lyons was tried before a jury in the Common Pleas Court of Lake County, Ohio, for two counts of involuntary manslaughter of the same person. The prosecutor claimed in the first count that the petitioner caused the death of the victim as a proximate result of his committing felonious assault. (The felonious assault was alleged to have occurred against another person, not the decedent.)

The second count claimed that the death occurred as a proximate result of the petitioner menacing the other person rather than feloniously assaulting him. The first count was a felony of the first degree, Ohio Revised Code 2903.04(A), and the second count was a felony of the third degree, Revised Code 2903.04(B). In other words, the case at trial involved the claimed conduct of the petitioner toward a third person which was the proximate cause of the accidental death of the decedent who was a bystander.

The jury was discharged without having returned a verdict.

The following relevant facts were found by the Magistrate and adopted by the District Court:

> The following events are relevant. Trial commenced June 4, 1984, a Monday, and continued to Thursday afternoon. The jury deliberated approximately one hour that afternoon, then was dismissed for the day and returned Friday morning.
>
> Late Friday afternoon the court inquired, through the bailiff, of the status of the deliberations. The jury responded they had reached a verdict on Count I but could not agree on Count II. The provisional verdict on Count I was never reduced to writing.
>
> After consulting with the parties the court gave further jury instructions, specifically, a modified *Allen* charge, which stressed they should attempt to decide the entire case and should continue deliberating as long as there was a possibility of reaching a verdict.
>
> The jury deliberated at least another hour thereafter. The court then decided, with petitioner's agreement, but over the prosecutor's objection, to send the jury home for the weekend.

The jury resumed deliberations Monday morning and continued until just before noon. They then sent the court a note stating: "We can't agree on either account (sic)." The court had an in-chambers meeting with counsel where the following discussion occurred (petitioner's exhibit, hereafter PX B, pp. 2, 5):

The Court: Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question to the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.

Counsel have agreed in this consideration with the Court, is that correct, Mr. Purola, that they are hung at this point?

Mr. Purola: Attaching no particular significances (sic) to this, I concur.

Mr. Hawkins: Yes, sir.

The jury was called into open court where the following colloquy transpired (PX C at 2):

The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?

The Foreman: Yes, sir.

The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

The Court accepts this conclusion and the foreman of the Jury agrees.

> The Prosecutor will present an entry on their finding.
>
> Members of the Jury, you are now excused. You may leave.

Magistrate's Report and Recommendation, A11.

After the discharge of the jury the petitioner moved the trial court for an order dismissing the indictment on double jeopardy grounds because the first jury had been improperly dismissed. That motion and one to reconsider that motion were denied.

Mr. Lyons then filed an interlocutory appeal to the Ohio Court of Appeals which affirmed the trial court's refusal to dismiss the case (actually to prohibit retrial).

The Supreme Court of Ohio denied discretionary review as did the Supreme Court of the United States. *Lyons v. Ohio,* 471 U.S. 1101.

The petitioner then filed a petition for habeas corpus in the United States District Court for the Northern District of Ohio challenging a future retrial on the grounds that it would violate his rights under the Double Jeopardy Clause. That court denied relief but found that Lyons had exhausted his state remedies and that he had not consented to the discharge of the jury. These two factual findings were never appealed by the respondent (A9).

The respondent did not object to a stay of state court proceedings during the period of the District Court's consideration of the petition.

The petitioner then filed an appeal to the Sixth Circuit from the District Court's denial of the writ. That

Court denied relief and affirmed the District Court on June 19, 1987.

The indictment is set for trial in November, 1987, but certainly would be stayed by consent pending this Court's decision on this petition.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

This case involves the least litigated protection afforded by the Double Jeopardy Clause of the Fifth Amendment: the defendant's "valued right to have his case decided by the first jury impaneled." *Wade v. Hunter*, 336 U.S. 684.

While the amount of litigation spawned by the three more common elements of double jeopardy protection, i.e., no second prosecution after conviction, no second prosecution after acquittal, not more than one punishment for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 717, has mushroomed in recent years, there have been very few cases, and none at this level, identifying when a defendant's "valued right" must give way.

This case presents important and as yet unresolved questions regarding how any trial judge, state or federal, should decide if a jury is, in fact, genuinely deadlocked. As the Sixth Circuit below observed, a trial judge is torn between holding a jury too long and later being challenged for being coercive and dismissing the jury only to be faced with jeopardy claims.

While the Sixth Circuit identified the proper dilemma, it fell easily into the wrong conclusion. Eschewing

hindsight and giving "great deference" will virtually guarantee that a defendant in such a situation will have his fate (i.e., jury) decided as much by accident as any other factor.

The solicitude for trial judges expressed by the Court below finds its basis in *Arizona v. Washington,* 434 U.S. 497 (1978) where this Court wrote that "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." *Id.* at 510.

But by failing to provide any guidelines for the exercise of discretion in such a situation, *Arizona v. Washington* leaves everyone in the dark as to whether it was properly exercised. The mere fact that the trial judge *was there* could not help him know, without inquiry, whether a verdict is possible. This was so because the trial judge would not know any division of the jury or anything but empirical fact that everyone would know, e.g., how long the jury was deliberating, the length of the trial, etc. All of those factors commonly lend themselves to more than one interpretation.

The one requirement that is missing and is long overdue as a matter of federal constitutional law is for the trial judge *to ask* each juror, individually, if he or she believes there is any possibility of reaching a verdict before discharging the jury as genuinely deadlocked.

Individual questioning of the jurors can easily be done without disruption and with a small investment in time. Indeed, in this case individual questioning might have taken 30 minutes and would almost certainly have saved three years of legal proceedings and thousands of dollars of everyone's money.

Somehow it has developed that the Court may receive the jury's communication that it cannot reach a verdict but that any detailed dialogue is dangerous. But private inquiries of jurors are frequently undertaken in trial settings with counsel and the court. For example, voir dire before trial that touches on an intensely personal subject is often done outside the presence of other jurors or in chambers.

Similarly jurors frequently report potential intrusions or overhearing somebody talking about the case they are trying. Those jurors are brought in with counsel for the parties and asked what they heard and what effect, if any, it had on them.

There is no difference between this kind of communication and asking a juror who is a member of a deliberating jury if there is any possibility that this jury could return a verdict.

The deference accorded a trial court's decision to abort a trial would be significantly enhanced if the trial judge had previously ascertained from the jurors, individually, that each felt that there was no possibility of a verdict being returned.

Particularized questioning is important for non-obvious reasons. In a case where the vote is 11 to 1 and has been for a long period of time (facts that would not and should not be known by the judge), the foreman may say "we cannot agree" but another member of the 11 man majority, who has no intention of changing his vote, may well say there is a possibility of reaching a verdict based on his own analysis of "minor" shifts in the arguments of the lone hold-out. In order to protect the defendant's "valued right" the trial court is constitutionally bound to engage

in that careful dialogue with the jury before discharging it.

There is considerable conflict and uncertainty among the circuits on the proper standard for determining when, or if, a jury is genuinely deadlocked.

In *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1982), the court observed that the question was "not the present inability of the jury to agree, but whether agreement is *possible*." *Id.* at 1127. *Horn* mandates that the judge ascertain from all jurors if there is a possibility of reaching a verdict. *Id.* The Ninth Circuit in *United States v. See*, 505 F.2d 845 at 851 (9th Cir. 1974), specifically said that "[m]erely questioning the foreman may not be sufficient, but this Circuit has recently held questioning the foreman individually *and* the jury either individually or as a group is satisfactory." (Emphasis original). "Upon receiving a communication from the jury stating that agreement cannot be reached, the judge *must* question the jury *independently* whether further deliberations might overcome the deadlock." (Emphasis added). *United States v. Cawley*, 630 F.2d 1345, 1349 (9th Cir. 1980); *United States v. Nelson*, 599 F.2d 714 (5th Cir. 1979); *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978); *Brown v. Hughes*, 485 F. Supp. 793, 796 (D.Az. 1980). Such questioning will ensure that jurors reluctant to voice their opinion in open court will have an opportunity to state their belief that a verdict is possible. *See e.g., Brown*, 485 F. Supp. at 797.

What those courts mean by "questioning the jury" is obvious. The Court must ask if there is any possibility that further deliberations might result in a verdict. Rather, it is crucial that the court determine whether it is the jury's collective opinion that further deliberations will not

result in a verdict. *Cawley,* at 1349; *McCarthy,* at 1387; *Brown,* at 796. A jury's collective opinion, which can be fairly ascertained by individual questioning, means more than just the foreman's. *Brown,* at 796.

Cases like *United States v. Glover,* 731 F.2d 41 (D.C. Cir. 1984), show the large differences in the way juries in this situation are handled. The D.C. Circuit's reference to *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972), *United States v. Gordy,* 526 F.2d 631 (5th Cir. 1976), *United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975), suggests that wide variances exist in the handling of these situations. *Glover, id.* fn. 11.

The Sixth Circuit's failure in *United States v. Larry,* 536 F.2d 1149, and *Jones v. Hogg,* 732 F.2d 53 (6th Cir. 1984) and the instant case to require individual questioning before a proper mistrial can be declared runs contrary to the Ninth Circuit's holding in *United States v. Cawley, supra,* and the Tenth Circuit's decision in *United States v. Horn, supra.*

Even if there is some way some of the circuit court decisions on this subject could be reconciled, there remains great uncertainty in the area and a very great deal of *ad hoc* decision making.

It makes no sense for this frequently occurring application of the Double Jeopardy Clause to operate on so little authoritative decisional law while the other protections of the Double Jeopardy Clause, which probably occur less frequently nationwide, are the subject of so much.

In no case could the need for individualized questioning be more obvious, or urgent, than this one. Three hours after having told the trial judge that an agreement had been reached, the jury was discharged without a single

question being asked of them, or of the foreman, if there was a possibility of reaching a verdict.

Incredibly and inexplicably the trial judge never said to the jury "you told us Friday you had an agreement on one count, is there a possibility further deliberations might result in a verdict on at least one count of the indictment?". The trial court ignored the recent agreement.

Of course the importance of that agreement is that a trial judge is not required to believe or accept the jury's statement that it is hopelessly deadlocked. A trial judge in this situation could well have thought that an "agreement" only three hours old could not have dissipated so quickly. Individual questioning of the jurors could have helped him in this regard.

The trial court in this case asked the jury while they were deliberating on Friday how it was progressing (Appendix to Petition A19). It was at this time that the first fact event relevant to this decision took place. The jury told the judge that it had an agreement on one count but not on the other. *Id.* Instead of telling the jury to return the "agreement," the judge told the jury, with some emphasis, to deliberate more. This was referred to in the District Court as a "modified *Allen* charge." (A17).

After a recess for the weekend, the jury deliberated two and three-fourths hours more on Monday and then wrote a note saying it could not come to an agreement on either count (A19). The court met with counsel and expressed its view that the jury was hung. *Id.*

Upon bringing the jury into court the judge made a statement more like a rhetorical question: "Mr. Ness, you have advised this Court that you are not able to reach an agreement on either count?" (Jury Discharge Proceed-

ing Transcript, A21). It certainly was not clear from that statement whether the judge was asking for confirmation that the jury could not agree on a verdict or whether he was asking for confirmation that the jury had sent a note.

The court then made another statement that was factually wrong at least in part: ". . . and reported to the Court that you are unable to reach a verdict." *Id.* The jury's note did not say it was "unable to reach a verdict," which would not have been sufficient to allow a mistrial, but said the jury was "unable to agree on either count."

The jury's statement and the judge's characterization of it did not even *address* the possibility of reaching a verdict; only current observations and assumptions were included in the communication with the jury.

The judge also commented that "you have considered this case for a considerable length of time" in the same sentence that he noted the jury reported it could not reach a verdict (A21). While this observation about time may be accurate in a larger sense, it is misleading in this case. The jury only considered the case for two and three-fourths hours since it had told the court it had an agreement on one count.

Lastly, the trial judge made another erroneous assumption, namely that the jury said it was unable to reach a verdict: "The court accepts this conclusion and the foreman of the Jury agrees." *Id.*

The jury's simple statement that it "cannot agree on either account (sic)" manifestly was *not* a conclusion that it was unable to reach a verdict, yet the trial judge made that leap without a moment's hesitation. A state-

ment that can only be viewed as a report of its present condition ("we cannot agree on either . . .") is simply not the same as saying it would not be able to, or could not reach a verdict. To add that the foreman agrees is gratuitous and not automatically accurate since, as noted above, the foreman's cryptic "Yes, sir" is subject to two quite distinct interpretations.

As this factual background shows, at no time did the trial judge ever specifically ask the jury or the foreman if a verdict could be reached; it merely assumed that present conditions would continue into the future.

While this failure is fatal to the trial court's conclusion because every court has held that the trial judge must "find out from the jury" if a verdict is possible or, put another way, if it is genuinely deadlocked, it is doubly so here because the trial court, by its disposition, affirmatively ignored the effect of the "agreement" the jury had said it had only two and three-fourths hours earlier on Friday afternoon.

There is a vast difference between being "unable to reach an agreement" and being "hopelessly deadlocked" and somewhere between the two lies the petitioner's constitutional right to be free from further prosecution. The trial judge never sought or received anywhere near an unequivocal indication that the jury was hopelessly deadlocked. Neither did he deal with the practical and constitutional effect of the recent agreement on the question of whether the jury was hopelessly deadlocked Monday. If inability to reach an agreement bears on the question of whether any jury is "hung," surely actually having reached an agreement must carry critical weight in the other direction, especially after such a short time.

The question presented here has national application every day, and the facts of this case provide an excellent vehicle for establishing long overdue standards for this application of the Double Jeopardy Clause.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 19, 1987)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 86-3962

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES H. LYONS,
Petitioner-Appellant,

v.

HONORABLE JAMES W. JACKSON, Common Pleas Court, Lake County, Ohio,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio.

Before: GUY and BOGGS, *Circuit Judges;* and EDWARDS, *Senior Circuit Judge.*

PER CURIAM. Lyons appeals from the denial of his petition for a writ of habeas corpus. The sole issue presented by Lyons' habeas petition concerned whether the double jeopardy provisions of the Constitution were implicated as a result of a mistrial declared in a criminal proceeding in which he was a defendant. The mistrial was the result of a hung jury in a state criminal prose-

cution. The district court concluded that the granting of the mistrial in the state court was appropriate and denied the writ. We agree and affirm.

I.

Lyons was tried in the Common Pleas Court of Lake County, Ohio, for involuntary manslaughter. The prosecution involved two counts. Each count embodied a different theory. The prosecution claimed in the first count that the death of the victim was the proximate result of Lyons' felonious assault on a third party. The second count claimed that the victim's death occurred as a result of Lyons "menacing" the third party rather than feloniously assaulting him. The first count was an Ohio first degree felony and the second count was a felony of the third degree.

The relevant events at trial were described by the magistrate below as follows:

> Trial commenced June 4, 1984, a Monday, and continued to Thursday afternoon. The jury deliberated approximately one hour that afternoon, then was dismissed for the day and returned Friday morning.
>
> Late Friday afternoon the court inquired, through the bailiff, of the status of the deliberations. The jury responded they had reached a verdict on Count I but could not agree on Count II. The provisional verdict on Count I was never reduced to writing.
>
> After consulting with the parties the court gave further jury instructions, specifically, a modified *Allen* charge, which stressed they should attempt to decide the entire case and should continue deliberating as long as there was a possibility of reaching a verdict.

The jury deliberated at least another hour thereafter. The court then decided, with petitioner's agreement, but over the prosecutor's objection, to send the jury home for the weekend.

The jury resumed deliberations Monday morning and continued until just before noon. They then sent the court a note stating. "We can't agree on either account (sic)." The court had an in-chambers meeting with counsel where the following discussion occured:

> The Court: Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question for the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.
>
> Counsel have agreed in this consideration with the Court, is that correct, Mr. Purola, that they are hung at this point?
>
> Mr. Purola: Attaching no particular significances (sic) to this, I concur.
>
> Mr. Hawkins: Yes, sir.
>
> The jury was called into open court where the following colloquy transpired:
>
> The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?
>
> The Foreman: Yes, sir.
>
> The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

> The Court accepts this conclusion and the foreman of the Jury agrees.
>
> The Prosecutor will present an entry on their finding.
>
> Members of the Jury, you are now excused. You may leave.

App. 13-15.

II.

The Constitution directs that no person shall be twice put in jeopardy of life or limb for the same offense. However, as we stated in *Jones v. Hogg*, 732 F.2d 53 (6th Cir. 1984):

> The double jeopardy clause is not an absolute bar to retrial in every case. A defendant may be retried where a "manifest necessity" exists to declare a mistrial in his initial prosecution. A deadlocked jury is a classic example of manifest necessity.

Id. at 54 (citations omitted). The courts have uniformly held that "the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Arizona v. Washington*, 434 U.S. 497, 509 (1978).

Thus, in the purest sense, our inquiry is whether there was a genuinely deadlocked jury here. In terms of habeas review, however, this inquiry translates into answering the question as to whether the trial judge failed to exercise the "sound discretion" entrusted to him. 434 U.S. at 510 n.28. In reviewing this exercise of "sound discretion" we do so against the command of *Arizona v. Washington* that "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." *Id.* at 510.

We are also guided in this inquiry by our decision in *Hogg* where the court stated:

> In determining whether sound discretion has been exercised, several factors must be considered. These factors include: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree on a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

Hogg, 732 F.2d at 56. Although the *Hogg* guidelines are helpful, they are illustrative rather than all inclusive. Additionally, the particular facts of each individual case must be considered and will dictate which of the *Hogg* factors, if any, should be accorded greater weight.

Applying the *Hogg* guidelines, we find the following facts support the conclusion that the trial judge properly exercised his discretion: (1) this was only a three and one-half day trial; (2) the issues were not complex; (3) the jury deliberated for thirteen and one-half hours over a three-day period; (4) the jury had been given a modified *Allen* charge; (5) petitioner did not object to the *Allen* charge; (6) petitioner's counsel agreed with the court that the jury was hung.

Although the court accepted the foreperson's assurance that the jury was hung and did not individually question each juror, this procedure is acceptable under these facts. *United States v. Larry*, 536 F.2d 1149, 1153 (6th Cir. 1976), *cert. denied*, 429 U.S. 984 (1976).

The fact that the jury had been given a modified *Allen* charge is also of particular significance. We agree with the magistrate's observations on this issue:

> The judge gave a modified *Allen* charge on Friday. The jury was instructed in part:
>
> > If you decide that you cannot agree and that further deliberations will serve no useful purpose, you may ask to be returned to the courtroom and report that fact to the Court. If there is a possibility of reaching a verdict, you should continue your deliberations.
>
> The clear import of these instructions was to inform the jury not to return to court without a verdict unless it was hopelessly deadlocked. Thus when the jury did return on Monday without a verdict and told the court it could not agree on either count, detailed inquiry was not necessary. The inquiry on Monday was similar to that in other cases following a previous *Allen* charge which found no double jeopardy violation. *Rogers v. United States*, 609 F.2d 1315 (9th Cir. 1979); *Henderson v. Wright*, 533 F. Supp. 1373 (D. Me. 1982).

App. 19.

Finally, we also attach significance to the fact that there is nothing in the record to indicate that the trial judge was motivated to declare a mistrial for reasons other than the interests of justice. This distinguishes the instant case from cases such as *United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976), where the appeals court concluded that the declaration of a mistrial after a jury had deliberated only five and one-half hours was motivated at least in part by the trial judge's desire to not miss his airplane flight home.

The life of a trial judge is not an easy one. If a jury is held after they indicate an inability to reach a verdict, the judge is accused of being "coercive." If the judge dismisses the jury and grants a mistrial, the trial judge is then faced with acquittal motions based on double jeopardy. Notwithstanding this dilemma, there is no doubt that an experienced trial judge has the best vantage point to determine whether further jury deliberations would be appropriate. Although with hindsight there is always more that could have been done, we find here that the judge's declaration of a mistrial was an appropriate response to the jury's conclusion that they could not agree.

AFFIRMED.

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed September 30, 1986)

Case No. C85-2421

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES H. LYONS,
Petitioner,

vs.

THE HONOBALE JAMES W. JACKSON,
Respondent.

JUDGMENT ENTRY

Upon consideration, this Court having filed its memorandum of opinion and order denying petitioner's application, pursuant to 28 U.S.C. § 2254 for writ of habeas corpus,

IT IS ORDERED that the petition is hereby dismissed.

/s/ ALVIN I. KRENZLER
United States District Judge

MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT

(Filed September 30, 1986)

Case No. C85-2421

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES H. LYONS,
Petitioner,

vs.

THE HONORABLE JAMES W. JACKSON,
Respondent.

MEMORANDUM OF OPINION AND ORDER DENYING WRIT OF HABEAS CORPUS

Petitioner has filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was earlier tried in state court on two counts of involuntary manslaughter. The trial court found that the jury was deadlocked, and declared a mistrial and ordered a retrial. The petitioner alleges that the retrial ordered by the trial court judge will place him in jeopardy a second time in violation of his Fifth Amendment rights.

Pursuant to L. Civ. R. 19.05, this case was referred to a Magistrate for a report and recommended decision. The Magistrate filed his Report and Recommended Decision with the Court. In his Report, the Magistrate concluded, from the evidence of record, that the state court properly declared a mistrial and ordered a retrial.

The petitioner has filed objections to the Magistrate's Report. The petitioner asserts that the trial judge did

not exercise proper discretion in discharging the jury but should have instead engaged in more personal questioning of the jury to determine if they were "genuinely deadlocked" and why they were unable to reach an agreement on either count in light of the fact that they had previously reported to the trial judge that they had come to an agreement on Count 1. Petitioner further claims that the single inquiry to the foreman was inadequate.

Upon review of the record, the Magistrate's Report and Recommended Decision, the petitioner's objections, and the relevant facts and law in the case, the Court is in accord with the Magistrate's Report and Recommended Decision. The trial judge is not required to address each juror independently to determine if the jury is hopelessly deadlocked. Rather, inquiry to the foreman alone is acceptable. *United States v. Larry,* 536 F.2d 1149 (6th Cir. 1976); *United States v. See,* 505 F.2d 845 (9th Cir. 1975). The trial court exercised proper discretion in weighing and considering all the relevant factors to determine whether or not the jury was "hopelessly deadlocked." *Jones v. Hogg,* 732 F.2d 53 (6th Cir. 1984). This Court further concludes that the petitioner's failure to request a partial verdict prior to the declaration of a mistrial and his failure to object to the modified *Allen* charge constitute an acquiescence to the trial judge's actions and prevents the petitioner from now claiming the opposite.

Accordingly, the Magistrate's Report and Recommended Decision is hereby adopted and incorporated by reference. The writ of habeas corpus, pursuant to 28 U.S.C. § 2254, is denied.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

REPORT AND RECOMMENDATION OF MAGISTRATE, UNITED STATES DISTRICT COURT

(Filed August 5, 1986)

No. C85-2421

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES H. LYONS,
Petitioner,

v.

THE HONORABLE JAMES W. JACKSON,
Respondent.

REPORT AND RECOMMENDATION

STREEPY, *Mag.*

James Lyons has petitioned this court for habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner was tried before a jury in Lake County Common Pleas Court on an indictment charging him with two counts of involuntary manslaughter of the same person. After the jury had deliberated for several days the trial court found them deadlocked and declared a mistrial. The case was then scheduled to be retried. Petitioner claims a retrial will place him in jeopardy a second time in violation of his fifth amendment right against double jeopardy.

Petitioner filed post-trial motions seeking relief on various grounds, including double jeopardy. The motion

was denied. Petitioner sought reconsideration of the double jeopardy claim, which was again denied. He appealed, and the state appellate court affirmed. His appeal to the Ohio Supreme Court was dismissed for want of a substantial constitutional question. The United States Supreme Court denied an application for certiorari. There has been exhaustion of state remedies on the double jeopardy claim.

Petitioner seeks a federal writ of habeas corpus despite the fact he has not been convicted of any state crime. Considerations of federalism would normally preclude federal court from hearing his claim; however, under exceptional circumstances it is permitted. A double jeopardy claim such as petitioner's constitutes such an exception; thus, in view of the fact petitioner exhausted state remedies, this court has jurisdiction. *Gully v. Kunzman,* 592 F.2d 283 (6th Cir. 1979), *cert. denied,* 442 U.S. 924 (1979).

The following events are relevant. Trial commenced June 4, 1984, a Monday, and continued to Thursday afternoon. The jury deliberated approximately one hour that afternoon, then was dismissed for the day and returned Friday morning.

Late Friday afternoon the court inquired, through the bailiff, of the status of the deliberations. The jury responded they had reached a verdict on Count I but could not agree on Count II. The provisional verdict on Count I was never reduced to writing.

After consulting with the parties the court gave further jury instructions, specifically, a modified *Allen* charge, which stressed they should attempt to decide the entire case and should continue deliberating as long as there was a possibility of reaching a verdict.

The jury deliberated at least another hour thereafter. The court then decided, with petitioner's agreement, but over the prosecutor's objection, to send the jury home for the weekend.

The jury resumed deliberations Monday morning and continued until just before noon. They then sent the court a note stating: "We can't agree on either account." The court had an in-chambers meeting with counsel where the following discussion occurred (petitioner's exhibit, hereafter PX B, pp.2, 5):

> The Court: Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question to the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.
>
> Counsel have agreed in this consideration with the Court, is that correct, Mr. Purola, that they are hung at this point?
>
> Mr. Purola: Attaching no particular significances to this, I concur.
>
> Mr. Hawkins: Yes, sir.

The jury was called into open court where the following colloquy transpired (PX C at 2):

> The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?
>
> The Foreman: Yes, sir.
>
> The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

The Court accepts this conclusion and the foreman of the Jury agrees.

The Prosecutor will present an entry on their finding.

Members of the Jury, you are now excused. You may leave.

The double jeopardy clause is not an absolute bar to successive trials. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984). To bar a retrial, jeopardy must first attach, then be terminated by some appropriate resolution of the case, *e.g.*, by an acquittal. *Id.* Jeopardy attached in this case when the jury was sworn in. *Richardson v. United States*, 468 U.S. 317, 325 (1984); *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Courts may declare a mistrial and order a retrial without running afoul of the double jeopardy clause "whenever, in their opinion, there is a manifest necessity for the act." *United States v. Scott*, 437 U.S. 82, 93 (1978). When a judge finds a jury is genuinely deadlocked there is manifest necessity, thus jeopardy does not terminate. *Arizona v. Washington*, 434 U.S. 497, 509 (1978). On the other hand, if a mistrial was improperly declared, jeopardy terminated, and the double jeopardy clause bars a retrial. *See, e.g., Downum v. United States*, 372 U.S. 734 (1963); *Richardson, supra.*

To insure the rights of the accused are "adequately protected, reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington*, 434 U.S. at 514. In deciding a jury is genuinely deadlocked, a trial judge must properly balance the interests of both sides. *Jorn*, 400 U.S. at 485. These are the "defendant's 'valued right' to have his trial completed by the first jury chosen

to hear the case . . . [and] 'the public's interest in fair trials designed to end in just judgment.'" *United States v. Love*, 597 F.2d 81, 86 (6th Cir. 1979), *quoting Illinois v. Sommerville*, 410 U.S. 458, 470 (1972). When the mistrial is based upon the trial judge's finding that the jury is deadlocked "great deference should be accorded" that decision. The prosecution has the burden of proof that the mistrial was the result of manifest necessity. *Washington*, 434 U.S. at 505, 508; *Jones v. Hogg*, 732 F.2d 53, 56, 57 (6th Cir. 1984).

While manifest necessity requires a "high degree" of necessity, the standard cannot "be applied mechanically or without attention to the particular problems confronting the trial judge." *Washington*, 434 U.S. at 505-06. The Sixth Circuit has identified the relevant factors:

> In determining whether sound discretion has been exercised, several factors must be considered. These factors include: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree on a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

Hogg, 732 F.2d at 56.

The timely objection factor must be considered in regard to events which occurred on two different days, Friday, see p. 9 [A18], *infra*, and Monday. The factor is not significant with references to Monday afternoon. Although petitioner had agreed in chambers that the jury was hung, he noted this was of little significance as the

jury had not yet been directly questioned. Upon declaring the mistrial the court did not ask if counsel wanted to be heard. These circumstances surrounding declaration of the mistrial do not constitute that positive sign of acquiescence by petitioner to the mistrial as is required in *Hogg*, 732 F.2d at 57.

There is no uniform minimum period during which a jury must deliberate before the court may declare a jury deadlocked. *Brown v. Hughes*, 483 F.Supp. 793, 797 (D. Ariz. 1980). Since each case varies and a cold record is difficult to gauge, the time needed for the jury to reach a verdict is often best left to the trial judge. *United States v. See*, 505 F.2d 845, 852, n.12 (9th Cir. 1974) (*"U.S. v. See"*), *cert. denied, Gordon v. United States*, 420 U.S. 492 (1975); *United States v. MacQueen*, 596 F.2d 76, 82 (2nd Cir. 1979). Petitioner's trial lasted approximately three and one-half days. He was charged with two counts of manslaughter. Neither party has suggested the issues were complex. The jury deliberated for thirteen and one-half hours over a three-day period. In *U.S. v. See* the court cited and relied in part on a 1966 study which found that for a 3-5 day trial the average jury reached a verdict in just under five hours or were hung after more than ten hours. This study reflects that the trial judge in the case *sub judice* acted reasonably in declaring a mistrial.

The primary dispute is whether there was adequate communication between the judge and jury. A "crucial factor" in determining the probability of reaching a verdict is a statement from the jury that it is "hopelessly deadlocked." *U.S. v. See*, 505 F.2d at 851. In petitioner's case the court had received a note from the jury stating: "We can't come to an agreement on either account." (PX B, p.4). Petitioner claims that the trial court failed thereafter to adequately question the jury to determine independently

whether further deliberations might overcome the deadlock. *See Arnold v. McCarthy,* 566 F.2d 1377, 1387 (9th Cir. 1978); *U.S. v. See,* 505 F.2d at 851-52; *United States v. Goldstein,* 479 F.2d 1061, 1068 (2nd Cir. 1973), *cert. denied,* 414 U.S. 873 (1973).

Failing to address each juror independently is not an abuse of discretion. Inquiry through the foreman, as occurred herein, is acceptable. *United States v. Larry,* 536 F.2d 1149 (6th Cir. 1976), *cert. denied, Larry v. United States,* 429 U.S. 984 (1976). Petitioner claims the judge did not engage in an adequate inquiry of the foreman. Under appropriate circumstances a fuller inquiry might be required, *see, e.g., U.S. v. See; United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975); however, in the context of this case, particularly in light of the events of Friday afternoon, the questioning on Monday afternoon was adequate.

The judge gave a modified *Allen* charge on Friday. The jury was instructed in part (PX A, p.3):

> If you decide that you cannot agree and that further deliberations will serve no useful purpose, you may ask to be returned to the courtroom and report that fact to the Court. If there is a possibility of reaching a verdict, you should continue your deliberations.

The clear import of these instructions was to inform the jury not to return to court without a verdict unless it was hopelessly deadlocked. Thus when the jury did return on Monday with a verdict and told the court it could not agree on either count, detailed inquiry was not necessary. The inquiry on Monday was similar to that in other cases following a previous *Allen* charge which found no double jeopardy violation. *Rogers v. United States,* 609 F.2d

1315 (9th Cir. 1979); *Henderson v. Wright*, 533 F.Supp. 1373 (D.Me. 1982).

Petitioner now contends that the trial judge erred on Friday afternoon in some language of the modified *Allen* charge and by not ordering the jury to return a partial verdict on Count I. He failed to request a partial verdict on Friday, or at any time prior to declaration of the mistrial, and failed to make any objection to the charge or other relevant matter. He had every opportunity to do so since the jury deliberated another hour on Friday, after the charge was given, and for a few hours on Monday. Petitioner not only failed to object, he agreed with the judge on Friday that the jury should be dismissed for the weekend. This reflects the positive circumstances necessary to infer petitioner's acquiescence in the judge's actions on Friday. *See Hogg, supra*, at p.57. He cannot be heard to claim the opposite now.

RECOMMENDATION

It is recommended the petition be dismissed.

/s/ JACK B. STREEPY
United States Magistrate

TRANSCRIPT OF THE COURT OF COMMON PLEAS FINDINGS RE DISCHARGE OF THE JURY

[2] BE IT REMEMBERED, that heretofore, to-wit: On Thursday, the 16th day of August, 1984, being one of the regular days of said Court, before the Honorable James W. Jackson, the following proceedings were had:

The Court: This is the State of Ohio v. James Lyons, Case No. 83 CR 685. Present is Albert Purola, attorney for the Defendant with Stewart Savage. Mr. Judd Hawkins is present, attorney for the State, assistant prosecutor for Lake County.

On August 7, 1984, this Court denied Defendant's motion for acquittal and scheduled this case for trial for August 20, 1984, at 9:00 a.m., this Monday.

Subsequent to that defense counsel has requested a hearing before this Court to supplement his record of the briefs and trial record for his filing a notice of appeal as to the Court's ruling as previously stated.

Mr. Purola has requested the Court to ask the bailiff, the Court's bailiff, Mr. John Clair, to state on the record his recollection of what transpired [3] on June 8, 1984, when at approximately 4:00 o'clock in the afternoon the Court inquired of the Jury, or had the bailiff inquire of the Jury as to whether or not they were close to a verdict. Mr. Clair what did the Jury say?

Mr. John Clair: The Jury told me that they had reached a verdict as to count one of the indictment, and they were hung as to count two.

At this point I told them that I would relay the message to the Court, which I immediately did.

The Court: Did they indicate they had reduced that verdict in writing?

Mr. Clair: They specifically said that the verdict as to count one had not been reduced to writing.

The Court: Did they indicate to you, to your knowledge, what that verdict was on either count?

Mr. Clair: I don't recall them saying that, no.

The Court: At which [4] point the Court gave an additional instruction to the Jury to reconsider deliberations, which is all part of the record. And after that instruction which neither counsel had any additional instructions to give, and were satisfied with that instruction, the Jury deliberated until 6:30 p.m. and were recessed for the weekend.

The Jury came back in at 8:30 on June 11, 1984, and deliberated until 11:45 a.m., when they submitted this message to the Court. "We can't come to an agreement on either account." At which time counsel were called into Court and as the record states that the Court stated in open Court: "Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question to the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.

* * * * *

TRANSCRIPT OF COURT OF COMMON PLEAS DISCHARGING THE JURY

[2] BE IT REMEMBERED, that heretofore, to-wit: On Monday, June 11, 1984, this case having been presented to the Jury, and the Jury having been in deliberations, the following proceedings were had in open Court:

The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?

The Foreman: Yes, sir.

The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

The Court accepts this conclusion and the foreman of the Jury agrees.

The Prosecutor will present an entry on their finding.

Members of the Jury, you are now excused. You may leave. After you are discharged you may discuss your verdict, or lack of obtaining a verdict, and your deliberation with others but you are not required to do so.

* * * * *